

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on June 28, 2012

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
James L. Larocca

CASE 12-E-0174 - Petition of AES Eastern Energy, L.P.,
AES Somerset, LLC, AES Cayuga, LLC and Somerset
Cayuga Holding Company, Inc. For Expedited
Approval Pursuant to Sections 69 and 70 of the
New York Public Service Law and Related
Approvals.

ORDER APPROVING TRANSFERS AND A FINANCING

(Issued and Effective June 29, 2012)

BY THE COMMISSION:

BACKGROUND

On April 13, 2012, AES Eastern Energy, L.P. ("AES Eastern"), AES Somerset, LLC ("AES Somerset"), AES Cayuga, LLC ("AES Cayuga")(together, the "AES Entities") and Somerset Cayuga Holding Company, Inc. ("NewCo")(collectively, the "Petitioners") requested approval under PSL §70 to transfer ownership of two coal-fired electric generation facilities -- the 668 MW Somerset Facility and the 311 MW Cayuga Facility -- from the AES Entities to NewCo, or one of NewCo's to-be-formed wholly-owned subsidiaries (Generation Facilities Transfer).¹ The transfer transaction arises out of a bankruptcy settlement authorizing

¹ References to NewCo include the wholly-owned subsidiaries; the names of those subsidiaries will be updated to the extent they are different from placeholders presented in the Petition.

creditors of the AES Entities to acquire the Somerset and Cayuga Facilities, with the transfer itself approved by the Bankruptcy Court conditioned upon obtaining further approvals from the Federal Energy Regulatory Commission (FERC), from the Siting Board,² and from this Commission. Operation of the Somerset and Cayuga Facilities under a new owner would facilitate continuation of the employment and property tax revenue benefits which currently flow to the Somerset and Cayuga communities as a result of the Facility's operations.

In addition to PSL §70 approval, NewCo also requests that we grant any approvals required under PSL §69 needed for NewCo to issue securities and assume debt in connection with the consummation of the transfer. Petitioners further request that lightened regulation of the Facilities continue in the hands of new owners.

Moreover, a single interconnection agreement with New York State Electric & Gas Corporation (NYSEG) currently governs the utility's provision of delivery services to the Somerset Facility, the Cayuga Facility, and four other non-operational generation facility sites (Non-Operational Plants) that are owned by affiliates of the AES Entities.³ The Facilities remain interconnected with NYSEG's transmission system under that agreement.

² Also on April 13, 2012, Petitioners filed an application with the New York State Board on Electric Generation Siting and the Environment (Siting Board) seeking authorization for the transfer of a certificate of environmental compatibility and public need (CEPN) to NewCo for the Somerset facility. See Case 12-F-0173, Joint Petition of AES Eastern Energy, L.P. and Somerset Cayuga Holding Company, Inc. For Authority To Transfer The Certificate of Environmental Compatibility and Public Need For the Somerset Generating Station.

³ References to the "AES Entities" include these affiliates -- AES Creative Resources, L.P. and AEE II, LLC -- each of which own two of the Non-Operating Plant sites.

Subsequent to Bankruptcy Court approval of the bankruptcy settlement providing for the transfer, and subsequent to the filing of the petition in this case, however, Petitioners reached a settlement agreement with NYSEG concerning these interconnections (NYSEG Settlement). Under the terms of the NYSEG Settlement, separate interconnection agreements for the Somerset Facility and for the Cayuga Facility will be entered into with NewCo. In addition, certain property and equipment owned by the AES Entities at the Non-Operational Plants would also be transferred to NYSEG. The NYSEG Settlement was approved by the Bankruptcy Court by Order dated May 30, 2012. On May 23, 2012, the Petitioners supplemented their filing to seek approval for these transfers here.

Petitioners initially requested that we take emergency action on their April 13, 2012 petition under the State Administrative Procedures Act ("SAPA") §202(6) to ensure our determination would be made no later than the May 17, 2012 Session. Subsequently, in the May 23, 2012 supplemental filing, Petitioners continue to seek approval on an emergency basis, albeit at the June 14, 2012 Session.

In conformance with SAPA §202(1), however, notice of the petition was published in the State Register on May 9, 2012. The SAPA §202(1)(a) period for submitting comments in response to the notice expired on June 25, 2012. The comments received pursuant to SAPA, and the Notice Scheduling Comment Period issued April 25, 2012 in this proceeding and Case 12-F-0173, are summarized below. Since our consideration of the petition falls after the expiration of the SAPA comment period, the Petitioners' request for approval on an emergency basis is moot.

POSITIONS OF THE PARTIES

The Petitions

In their initial petition requesting approval of the Generation Facility Transfer, the Petitioners describe the current ownership structure for the Somerset and Cayuga Facilities, with AES Eastern acting as the owner and operator of the Facilities. The Petitioners note that AES Eastern is regulated lightly;⁴ that it acquired the Facilities from NYSEG through a transaction approved in 1999;⁵ and, that the transaction was financed through a sale and leaseback arrangement also approved in 1999.⁶

AES Somerset and AES Cayuga, the Petitioners continue, are AES Eastern affiliates that provide operation and maintenance services at the Somerset and Cayuga facilities. All of the AES Entities, including the affiliates that own and control four Non-Operational Plants, are, in turn, wholly-owned indirect subsidiaries of AES Corporation ("AES"), a global power company.

The Petitioners next turn to NewCo, which, they report, will acquire all of AES Eastern's interests in the Somerset and Cayuga Facilities. NewCo, they report, will be owned by the Certificate Holders, which are the entities that

⁴ Case 99-E-0148, AES Eastern Energy, L.P., Order Providing For Lightened Regulation (issued March 23, 1999)(Lightened Regulation Order).

⁵ Case 96-E-0891, New York State Electric & Gas Corporation - Electric Rates and Restructuring, Order Approving Transfer of Electric Generation Facilities, Approving Contracts Upon a Condition, and Making Other Findings (issued December 3, 1998).

⁶ Case 99-E-0605, AES Eastern Energy, L.P., Order Authorizing Issuance of Lease Obligation Notes and Entry Into Revolving Credit Agreements (issued May 6, 1999).

provided the \$550 million in the lease-saleback financing AES Eastern obtained to support its acquisition of the Facilities in 1999. Five of these Certificate Holders are denominated as the Backstop Parties -- California Public Employees' Retirement System ("CalPERS"), Carlyle Strategic Partners II, L.P. and CSP Co-Investment II, L.P. (together, "Carlyle"), Marathon Asset Management, L.P. ("Marathon"), MacKay Shields, LLC ("MacKay Shields"), and Standard General, L.P. ("Standard General") -- and they will share the right to name four of the five members of the Board of Directors for NewCo. Carlyle and Marathon will collectively nominate three of the members of NewCo's Board, with Standard General, MacKay Shields and CalPERS collectively nominating another Board member. Four other Certificate Holders that are not Backstop Parties -- J.P. Morgan Investment Management Inc. ("J.P. Morgan"), Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch"), Värde Partners, Inc. ("Värde") and Whitebox Advisors LLC -- would share the right to nominate the fifth Board member.

Moreover, five of the Certificate Holders are denominated as the NewCo Affiliated Owners -- CalPERS, Carlyle, Marathon, Standard General and J.P. Morgan. They are each expected to own or control 10% or more, but not more than 20%, of NewCo's outstanding common stock. The remaining Certificate Holders may hold interests of less than 10%. Notwithstanding that, among these latter Certificate Holders, Merrill Lynch and Värde also own member interests of 20% or less in MACH Gen LLC, the indirect owner of the 1,080 MW Athens Generating Facility,⁷ the Petitioners maintain the affiliation will not create market

⁷ See Case 09-E-0144, MACH Gen LLC, Declaratory Ruling on Review of An Ownership Transfer Transaction (issued April 22, 2009); Case 09-E-0144, MACH Gen LLC, Declaratory Ruling on Review of An Ownership Interest Transfers (issued September 6, 2005) (Athens Rulings).

power because a Merrill Lynch and Värde lack controlling interests in NewCo.⁸

The Petitioners maintain that the transfer transaction will not create the potential for the exercise of market power. With three exceptions, the Petitioners explain, none of the Certificate Holders that will own stock in NewCo are engaged in electric wholesale market activities within New York; or own or control 10% or more in the voting securities of any entity that owns or controls electric generation or transmission facilities or inputs to electric power production in New York; or, is affiliated with a franchised New York public utility.

Describing the first of the exceptions, the Petitioners note that the parent of J.P. Morgan, JPMorgan Chase & Co. ("JPMorgan Chase") wholly owns, indirectly, JPMorgan Energy Ventures Corporation, a power marketer that participates in wholesale sales of electricity. JPMorgan Chase, they continue, also owns various interests in wind electric generating facilities located in New York. FERC, the Petitioners elaborate, has declared the interests to be passive,⁹ except for those held in Noble Environmental I Power LLC (Noble), which owns wind generation facilities located in New York sized at a maximum capacity of 606 MW. The Petitioners believe the interests in Noble are also passive, albeit FERC has not been asked to rule on the question. JPMorgan Chase also participates in a wide variety of financial transactions involving generation-related activities; its role in those transactions, say the Petitioners, is transitory and passive,

⁸ See Case 08-M-0659, Regulation of Ownership Interests, Order Establishing Presumption and Closing Proceedings Without Prejudice (issued December 21, 2010)(Ownership Interests Order).

⁹ See AES Creative Resources, L.P., 129 FERC ¶61,239 (2009).

and their magnitude and character fluctuate widely over time. The interests, the Petitioners assert, do not enable JPMorgan Chase to exercise any discretion over how and when electric power may be sold.

Turning to the second exception, the Petitioners report that CalPERS owns 75% of the non-managing membership interests in Neptune Regional Transmission System LLC ("Neptune"), the owner of 660 MW high-voltage direct current submarine transmission line linking New Jersey with Long Island.¹⁰ The Petitioners point out that FERC has ruled these interests are passive and do not confer control over Neptune or its facilities, and so do not fall within its jurisdiction.¹¹

Regarding the third exception, the Petitioners explain that Carlyle and its affiliates invest in affiliates of Riverstone LLC, which owns several small generating facilities in New York that total approximately 96 MW in capacity. The Petitioners believe that Carlyle's investment in those facilities is too remote from decisional authority over their operations for Carlyle to be treated as controlling the capacity, and, in any event, the size of that capacity is too small to create the potential for the exercise of market power.

Even if the JPMorgan Chase interests in 606 MW of wind capacity and the Carlyle interests in 96 MW of generation capacity are recognized as affiliated with ownership of the Somerset and Cayuga Facilities, the Petitioners state, the net effect of the proposed transaction is that the Herfindahl-Hirschman Index (HHI) of market concentration in New York's

¹⁰ See Case 05-E-0669, Neptune Regional Transmission System LLC, Order Providing For Lightened Regulation (issued November 30, 2005).

¹¹ California Public Employees Retirement System, 138 FERC ¶61,073 (2012).

wholesale electric markets increases by only 1.5 points. As a result, the Petitioners believe that the various affiliations of NewCo's owners will not enable them to exercise market power through NewCo's ownership of the Somerset and Cayuga Facilities.¹² There is no potential for the exercise of vertical market power, the Petitioners assert, given the absence of affiliations with owners that control transmission facility operations (other than interconnections).

The Petitioners explain that the Generation Facility Transfer was arranged under the supervision of the Bankruptcy Court. They report that the AES Entities commenced voluntary Chapter 11 proceedings on December 31, 2011, and, after extensive proceedings, the Bankruptcy Court approved the sale to NewCo on April 11, 2012. The Petitioners note that NewCo will contract with a qualified energy management services provider to supervise the operation of the Facilities, and will retain the existing employees necessary to continuing the safe and reliable operation of the Facilities.

The Petitioners also request approval of proposed financing arrangements needed to satisfy capital requirements NewCo will incur in owning and operating the Somerset and Cayuga facilities. NewCo plans to issue non-voting debt securities in the amount of \$125 million, denominated as PIK Notes, which would be secured by a first priority lien on all of the NewCo's assets and would be purchased by some or all of the Certificate Holders. The PIK Notes will be convertible into shares of NewCo common stock at the option of the PIK Note holders, subject to the receipt of all necessary regulatory authorizations.

The five Backstop Parties have committed to purchase PIK Notes in at least their pro rata share of their ownership of

¹² Petitioners believe the ownership interests NewCo affiliates hold in generation capacity located in markets adjacent to New York are de minimis in size and effect.

equity in NewCo, and other Certificate Holders may also purchase PIK Notes, up to their pro rata share of equity ownership. The Backstop Parties are also obligated to purchase any PIK Notes left unsold after the other Certificate Holders have exercised their options to buy them. The proceeds of the financing would be used for working capital needs, operational losses and capital expenses, and may be used to purchase some assets.

In the supplement to their petition, the Petitioners address a Supplemental Transfer effectuating the NYSEG Settlement. Pursuant to the Settlement, certain transmission equipment and land located at the Non-Operational Plants will be transferred to NYSEG. NYSEG, in turn, agreed that, upon request, it would transfer, to the appropriate AES Entity or its successor, a 0.274-acre parcel located adjacent to the former Greenidge Generating Facility, one of the Non-Operating Plants. The Supplemental Transfer was approved by the Bankruptcy Court on May 30, 2012.

The Supplemental Transfer, the Petitioners assert, resolves NYSEG's concern that, absent the making of proper arrangements at the Non-Operating Plants, the safe and reliable operation of the utility's transmission systems could be adversely affected. As a result of the Transfer, the Petitioners maintain, NYSEG will be able to make arrangements to separate the transmission equipment it needs to operate its transmission system safely and reliably from other equipment at the sites of the four Non-Operating Plants. The Petitioners also note that NYSEG will incur operational costs at the four Non-Operating Plant sites after a six-month period expires, but that it obtains an unsecured claim for the costs of completing the separation and relocation work that it may submit in the bankruptcy proceeding.

The Comments

NYSEG initially objected to the relief the Petitioners requested, but withdrew its objections once the NYSEG Settlement was entered into and the Supplemental Transfer arrangement was approved by the Bankruptcy Court. The Transfer, NYSEG believes, will enable it to safely and reliably continue operation of its transmission system and protect the interests of its customers, by allowing it to separate and relocate existing transmission facilities at the Non-Operational Plants so that it can own them or control their operation.

The Department of Environmental Conservation (DEC) initially objected to the proposed transfer, on the grounds that the Somerset and Cayuga Facilities were not in compliance with New York's Regional Greenhouse Gas Initiative (RGGI), and that the transfer of ownership raised issues regarding the transfer of clean air operating permits to NewCo. DEC, however, withdrew its objection on June 6, 2012, after it and the AES Entities reached agreement on RGGI issues.

The Sierra Club and Environmental Advocates of New York (collectively, "Sierra Club") supported DEC's objection to the transfer based on RGGI issues. It also raised other issues concerning compliance with clean water and air permit requirements at the Cayuga facility.

The Petitioners responded to the Sierra Club, arguing that DEC's settlement of RGGI issues rendered that objection to the proposed transfers moot. Clean water and air issues, the Petitioners contend, fall within the purview of DEC's jurisdiction, and so should be raised in DEC proceedings, not here. They point out DEC has issued letter of intent to transfer all needed clean water and air operating permits to NewCo.

Moreover, the Petitioners maintain that no violation notices from DEC have been received recently at the Somerset or Cayuga Facilities. The Petitioners also assert that the Somerset and Cayuga Facilities are in full compliance with their clean water and air permits, and very limited instances of compliance difficulties caused by storm water runoff have been addressed and corrected. Finally, the Petitioners contend that NewCo, as the new operator of the Somerset and Cayuga Facilities, is financially capable of maintaining the plants, including meeting all environmental compliance requirements.

DISCUSSION AND CONCLUSION

PSL §70 SEQRA Review

Under the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law, and its implementing regulations, (6 NYCRR Part 617 and 16 NYCRR Part 7), all State agencies must determine whether the actions they are requested to approve may have a significant impact on the environment. Other than our approval of the action proposed here, no additional State or local permits or approvals for the transfer of the generation facilities, the land or the equipment are required, and so a coordinated review under SEQRA is not needed. We will assume Lead Agency Status under SEQRA and conduct an environmental assessment.

The SEQRA regulations, at NYCRR §617.6(a)(3), require applicants to submit a completed environmental assessment form (EAF) describing and disclosing the likely impacts of the proposed actions. Petitioner submitted a Part I Long-Form EAF that they later supplemented with an addendum.

The proposed action is the approval of the transfer of the Somerset and Cayuga coal-fired electric generation facilities from the AES Entities to NewCo, with no changes to

the physical operation of the generation facilities by the new owners that will result in significant adverse physical impacts upon the environment, the approval of the transfer of property and equipment at the Non-Operating Plants from the AES Entities to NYSEG, and the approval of a contingent transfer of a small parcel of land from NYSEG to the AES Entities. NYSEG's acquisition of land, potential sale of land, and separation of the equipment it will acquire from equipment owned by the AES Entities will not change the physical operation of equipment and will not result in significant adverse physical impacts upon the environment.

The proposed action does not meet the definition of either Type 1 or Type 2 actions that are contained in 6 NYCRR §§617.4, 617.5, and 16 NYCRR §7.2, so it is classified as an "unlisted" action requiring SEQRA review. After review of the EAF, as supplemented, and the Petition, as supplemented, we conclude, based upon the criteria for determining significance listed in 6 NYCRR §617.7(c), that there will be no changes due to the proposed sales of the generation facilities, property interests and equipment that will result in significant adverse environmental impacts. Staff has completed Part II of the Long-Form EAF.

As Lead Agency, we determine that the action proposed in the petition, as supplemented, will not have a significant impact on the environment and adopt a negative declaration pursuant to SEQRA. Because no adverse environmental impacts were found, no Public Notice Requesting Comments is required or will be issued. A Notice of Determination of Non-Significance for this unlisted action is attached. The completed EAF will be retained in our files.

The Transfers

Under PSL §70, our approval is required before an electric corporation may transfer ownership interests in its electric plant. In conducting a review under §70 that pertains to a lightly-regulated electric corporation operating in wholesale electric markets, we examine any affiliations with fully-regulated New York utilities or power marketers that might afford opportunities for the exercise of market power or pose the potential for other transactions detrimental to captive ratepayer interests.

When reviewed with the reduced scrutiny applicable under lightened regulation, the ownership transfers the Petitioners propose here are in the public interest. As to the Generation Facilities Transfer, the acquisition of the Somerset and Cayuga Facilities by NewCo does not pose the potential for the exercise of horizontal market power.

After the transaction is consummated, NewCo will own the AES Entities' existing interests in the Somerset and Cayuga Facilities. Since NewCo is acquiring only existing interests that were insufficient in size to create market power, the potential for the transaction to pose a horizontal market power concern depends first upon the extent to which the owners of NewCo also own interests in other generating facilities located in New York. None of the new owners of NewCo, however, will hold more than a 20% share in it. Moreover, Merrill Lynch and Värde, which will own interests in both the Somerset and Cayuga Facilities, at a combined capacity of 979 MW, and the Athens Facility, at a capacity of 1080 MW, will hold no more than 10% of the interests in the former or 20% of the interests in the latter.

Under these circumstances, the relevant horizontal market power analysis begins with the de-rating of each owner's

interests, by allocating to that owner only the capacity that represents its proportionate share of the total ownership of a generation facility. After the proportionate shares are summed, the analysis shows that, following consummation of the transaction, none of the owners of NewCo will hold, directly or through affiliates, a share of capacity operating in New York wholesale electric markets in excess of 1,000 MW. That level of ownership is well below the level of concern.¹³ Moreover, even if NewCo itself, as the owner of all of the Somerset and Cayuga Facilities' capacity, were considered affiliated with additional ownership of capacity through JPMorgan Chase and Carlyle, the small increase in HHI that results indicates that market concentration will not increase substantially.

To the extent that CalPERS' interest in the Neptune transmission line could be deemed to enable it to benefit from manipulation of the sale of generation in wholesale electric markets, that transmission line, connecting Long Island to New Jersey, is located far from the sites of the Somerset and Cayuga Facilities in western New York. The distance that separates the CalPERS interests in these facilities mitigates the potential for the exercise of horizontal market power, because western New York and Long Island constitute separate generation markets during the vast majority of hours.

The ownership interests Merrill Lynch and Värde hold in the Athens Facility, however, raise another issue. If those two entities become an electric corporation as a result of their Athens Facility interests, they must obtain approval, pursuant to PSL §70(3), before they acquire any stock in NewCo. For the purposes of this transaction only, however, Merrill Lynch and Värde will not be deemed electric corporations because of their

¹³ See Case 08-E-0410, LS Power Development LLC, Declaratory Ruling on the Acquisition of Common Stock (issued May 27, 2008).

Athens Facility holdings. As discussed in the Athens Rulings, ownership interests in the Facility, other than one owner authorized to own up to 40% of the interests, is widely dispersed. At less than 20% of the ownership interests in that Facility, the interests Merrill Lynch and Värde hold will not, given these circumstances, be deemed sufficient to treat them as electric corporations at this time, pursuant to the analysis provided for in the Ownership Interests Order. Therefore, their acquisition of less than 10% of the interests in NewCo need not be reviewed under PSL §70(1), (3), or (4).¹⁴ All owners of interests in the Somerset and Cayuga Facilities, and in the Athens Facility, however, are reminded that when they engage in transactions involving ownership interests in electric generation facilities in New York, they must be cognizant of PSL §70(3), and of the guidance provided in the Ownership Interests Order.

Nor do the proposed transfers pose the potential for the exercise of vertical market power. Neither NewCo nor its affiliates exercise control over electric delivery facilities (other than interconnections), or substantial influence over inputs, like fuel, into the production of generation supply within New York, notwithstanding, as discussed below, the interests CalPERS holds in the Neptune transmission line. As a result, those avenues to the undue exercise of vertical market power are foreclosed. While the affiliation of NewCo with a power marketer through JPMorgan Chase could pose the potential for the exercise of market power, that potential can be

¹⁴ As indicated in the Ownership Interests Order, under PSL §70(3), Certificate Holders owning less than 10% of the interests in the Athens Facility, and acquiring 10% or less of the stock in NewCo, need not obtain approval for that acquisition.

addressed through PSL §110(1) and (2), which are imposed on NewCo and its affiliates to the extent necessary.

As to CalPERS, FERC has declared that the ownership interests CalPERS holds in Neptune are passive. Moreover, as discussed above, Neptune's transmission line, serving Long Island, is located far from the sites of the Somerset and Cayuga Facilities in western New York. Consequently, under these circumstances, CalPERS will not be treated as owning or controlling the Neptune transmission line for the purpose of a vertical market power analysis. As a result, its financial interests in that transmission line do not pose the potential for the exercise of vertical market power. Therefore, for all these reasons, the Generation Facilities Transfer does not raise market power concerns.

Moreover, the new owner of the Somerset and Cayuga Facilities will affiliate with experienced generation facility operators, appears sufficiently capitalized, and will continue the existing arrangements for operation of the Somerset and Cayuga Facilities. The transfer will also facilitate the continued operation of the Facilities, thereby preserving jobs and property tax base to the benefit of the communities where the Facilities are located. Continued operation will also enhance competition in New York wholesale electric markets to the benefit of consumers. As a result, the transfer of ownership interests in the Somerset and Cayuga Facilities to NewCo is approved, pursuant to PSL §70(1), and the acquisition of more than 10% of the stock in NewCo by each of the NewCo Affiliated Owners is also approved, pursuant to PSL §70(4).

The objection of the Sierra Club to these transfers lacks merit. DEC has withdrawn its opposition to the transfers, demonstrating that its concerns, including compliance with RGGI requirements, have been satisfied. Sierra Club has failed to

demonstrate that DEC is pursuing any violation of clean air or water permits at the Somerset and Cayuga facilities; that any substantial violation of clean air or water permits is presently outstanding; or, that any as-yet unsubstantiated allegations that the permits have been violated are not best resolved at DEC instead of here.

The Supplemental Transfer is also approved. The terms and conditions of the sale, including the sale of land and equipment by the AES Entities to NYSEG and the requirement that NYSEG transfer to the AES Entities or their successors, upon request, a small parcel of land located adjacent to the former Greenidge Generating Facility, have been approved by the Bankruptcy Court, but are also subject to review under PSL §70(1).¹⁵ The Supplemental Transfer, however, is in the public interest because its terms and conditions reasonably resolve the issues raised in this proceeding; enable NYSEG to continue the safe and reliable operation of its transmission system; and, avoid the disruptions and risks to safe and reliable electric service that would arise if the ownership and operational responsibilities specified in the NYSEG Settlement were not effectuated here.

All these approvals are conditioned on approval by the Siting Board in Case 12-F-1073 to transfer the CEPN. Moreover, NYSEG shall make a compliance filing proposing appropriate accounting entries in an appropriate proceeding if it incurs incremental capital or operating costs, not reimbursed in the bankruptcy proceeding, as a result of separating or otherwise managing equipment at the Four Operating Plant sites, or if following a request, it effectuates the transfer of the parcel of land adjacent to the Greenidge Generating Station.

¹⁵ See Case 09-E-0348, Caithness Long Island LLC, Order Approving Transfer (issued July 21, 2009).

The Financing

Approval of NewCo's financing plans is appropriate under lightened regulation. The scrutiny applicable to monopoly utilities may be reduced for lightly-regulated companies like NewCo that operate in a competitive environment. As a result, we need not make an in-depth analysis of the proposed financing transactions. Instead, by relying on the representations the Petitioners make in their filings, prompt regulatory action is possible.¹⁶

The proposed financing appears to be for a statutory purpose and does not appear contrary to the public interest. It is approved up to the requested maximum amount of \$125 million. Given that NewCo is subject to lightened regulation, it is afforded the flexibility to modify, without our prior approval, the identity of the financing entities, payment terms, and amount financed under the transactions, up to the \$125 million ceiling.¹⁷ Affording it this flexibility avoids disruption of its financing arrangements and enables it to operate more effectively in competitive wholesale electric markets, thereby promoting the efficient development of these markets. Captive New York ratepayers cannot be harmed by the terms of this financing because NewCo and the Backstop Parties and other Certificate Holders participating in the financing, bear all the financial risk associated with this financial arrangement.

¹⁶ Because a PSL §69 approval of a securities issuance is a Type 2 action for the purposes of the State Environmental Quality Review Act, 16 NYCRR §§7.2(a) and 7.2(b)(2)(v), no further review is required under that statute.

¹⁷ See, e.g., Case 10-E-0405, NRG Energy, Inc., Order Approving Financing (issued November 18, 2010); Case 01-E-0816, Athens Generating Company, L.P., Order Authorizing Issuance of Debt (issued July 30, 2001).

Continuation of Lightened Regulation

NewCo will be lightly regulated after the transfer is consummated in accordance with the Light Regulation Order. To the extent discussed in the Light Regulation Order and other previous Orders,¹⁸ however, NewCo is reminded that the Somersset and Cayuga Facilities and those entities that exercise control over their operations remain subject to the PSL with respect to matters such as enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4.¹⁹ Included among these requirements are the obligations to conduct tests for stray voltage on all publicly accessible electric facilities,²⁰ to give notice of generation unit retirements,²¹ and to report personal injury accidents pursuant to 16 NYCRR Part 125.

The Commission orders:

1. The transfers of the ownership interests in generation facilities, land and equipment described in the petition filed in this proceeding, as supplemented, and in the body of this Order, are approved, conditioned on the approval of

¹⁸ See, e.g., Case 11-E-0351, Stony Creek Energy LLC, Order Granting Certificate of Public Convenience and Necessity, Providing for Lightened Ratemaking Regulation and Approving Financing (issued December 15, 2011).

¹⁹ The PSL 66(6) annual report requirement that pertains to lightly regulated entities is under review in Case 11-M-0294; any revisions to the requirement adopted in that proceeding will also adhere in this proceeding.

²⁰ Case 04-M-0159, Safety of Electric Transmission and Distribution Systems, Order Instituting Safety Standards (issued January 5, 2005) and Order on Petitions for Rehearing and Waiver (issued July 21, 2005).

²¹ Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

the New York State Board on Electric Generation Siting and the Environment for transfer of the Certificate of Environmental Compatibility and Public Need for the Somerset Generation Facility in Case 12-F-0173.

2. The financing arrangements described in the Petition filed in this proceeding and discussed in the body of this Order are approved, up to a maximum amount of \$125 million, subject to the discussion in the body of this Order.

3. New York State Electric & Gas Corporation shall make, if necessary as discussed in the body of this Order, the compliance filing, addressed in the body of this Order, proposing appropriate accounting entries.

4. This proceeding is closed.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 12-E-0174 - Petition of AES Eastern Energy, L.P., AES Somerset, LLC, AES Cayuga, LLC and Somerset Cayuga Holding Company, Inc. For Expedited Approval Pursuant to Sections 69 and 70 of the New York Public Service Law and Related Approvals.

NOTICE OF DETERMINATION
OF SIGNIFICANCE
NEGATIVE DECLARATION

NOTICE is hereby given that an Environmental Impact Statement will not be prepared in connection with the approval by the Public Service Commission, under Public Service Law §70.

Under the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law, and its implementing regulations, (6 NYCRR Part 617 and 16 NYCRR Part 7), all State agencies must determine whether the actions they are requested to approve may have a significant impact on the environment. Other than our approval of the action proposed here, no additional State or local permits or approvals for the transfer of the coal-fired generation facilities, land and equipment are required, and so a coordinated review under SEQRA is not needed. We will assume Lead Agency Status under SEQRA and conduct an environmental assessment.

The SEQRA Regulations at 6 NYCRR §617.6(a)(3) requires applicants to submit a completed environmental assessment form (EAF) describing and disclosing the likely impacts of the proposed actions. Petitioner submitted a Part I Long-Form EAF, and later supplemented it with an addendum.

The proposed action is the approval of the transfer of the Somerset and Cayuga coal-fired electric generation facilities by AES Eastern Energy, L.P., AES Somerset LLC, AES Cayuga LLC, ("AES Entities") to NewCo, the approval of the

transfer of land and equipment from the AES Creative Resources LLC and AEE II LLC (also the "AES Entities") to New York State Electric & Gas Corporation (NYSEG) at four Non-Operational Plant sites, and the transfer of land by NYSEG at one of those sites to the AES Entities, if requested, with no changes to the physical operation of the generation facilities or equipment that will result in significant adverse physical impacts upon the environment. The proposed action does not meet the definition of either Type 1 or Type 2 actions that are contained in 6 NYCRR §617.4 and 617.5, and 16 NYCRR §7.2, so it is classified as an "unlisted" action requiring SEQRA review. After review of the EAF and the Petition, as supplemented, we conclude, based upon the criteria for determining significance listed in 6 NYCRR §617.7(c), that there will be no changes due to the sale of the generation facilities, property or equipment interests that will result in significant adverse environmental impacts. Staff has completed Part II of the Long-Form EAF.

As lead agency, we determine that the action proposed in the petition will not have a significant impact on the environment and adopt a negative declaration pursuant to SEQRA. Because no adverse environmental impacts were found, no Public Notice Requesting Comments is required or will be issued. The completed EAF will be retained in our files.

The address of the Public Service Commission, the lead agency for the purposes of the Environmental Quality Review of this action, is Three Empire State Plaza, Albany, New York 12223-1350. Questions may be directed to Richard H. Powell at (518) 486-2885 or to the address above.

JACLYN A. BRILLING
Secretary